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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 387

JOHN ROBERT JOINES,
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Third Circuit

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to the United States Court of Appeals for the Third Circuit

The petitioner, John Robert Joines, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Third Circuit was filed on June 25, 1957, and is unreported as of this date, but is appended to this petition, as is the judgment of the Court of Appeals denying rehearing, filed July 23, 1957.

The memorandum of the United States District Court for the Middle District of Pennsylvania, denying the petitioner's motion to suppress the evidence, was filed on December 6, 1956, is unreported, but is set forth in full on pages 32a-36a of Appendix in Court below.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The jurisdiction of the Supreme Court of the United States is invoked to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered on June 25, 1957, and the order of the said Court, dated July 23, 1957, denying a timely petition for rehearing. The statutory authority conferring on the Supreme Court of the United States jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit, is the Act of Congress of June 25, 1948, c. 646, 62 Stat. 928, 28 USCA 1254(1).

THE QUESTIONS PRESENTED FOR REVIEW

1. If a federal officer receives from U. S. Commissioner, on November 22, a warrant for arrest of petitioner, which

warrant commands officer to arrest petitioner and bring him before Commissioner "forthwith"; and, thereafter, for a period of twenty-one days, until December 13, officer conducts surveillance of petitioner's home passing up daily convenient opportunities to arrest petitioner, is this such non-compliance and breach of the Federal Rules of Criminal Procedure to render invalid said warrant of arrest for purpose of entering petitioner's home and searching it, ostensibly for the purpose of arresting petitioner?

2. Assuming warrant for petitioner's arrest to be valid, is a search of his home incident to a valid arrest therein when he was in fact not in his home, but sixteen miles distant; and, when he was not arrested until the day following the search?

3. Assuming warrant for petitioner's arrest was valid and lawful, may officers search his home ostensibly to find and arrest him, without first procuring a search warrant from a magistrate, when such officers admit they had personal knowledge of more than sufficient evidence of violations committed in their presence, to procure search warrant?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth and Fifth Amendments to the Constitution and Rule 4 (b) (1) of the Federal Rules of Criminal Procedure, which are printed in Appendix hereto.

STATEMENT OF THE CASE

The petitioner is a dairy farmer and lives in York County, Pennsylvania, on his 130 acre farm. In September, 1954, William L. Riley, Investigator of The Alcohol and Tobacco Tax Unit of the Internal Revenue Service—Baltimore Office—suspected that petitioner was violating the Alcohol Tax provisions of the Internal Revenue Laws (App. 55a, 56a).

For five weeks or more Riley and other investigators of the Alcohol and Tobacco Tax Unit kept petitioner's home under surveillance by "day" and "night," from "two to six" days each week, from "six to fourteen" hours per day, from hidden points on or near to petitioner's farm home, employing vehicles and radio equipment in so doing (App. 55a, 56a). They saw "known violators" visiting petitioner's home, driving their cars in with the lights "out" or parking their cars some distance away and walking to petitioner's home (App. 56a); they saw petitioner and a "known violator" unloading 100 pound bags of sugar, placing it on the porch of petitioner's home (57a).

About five weeks after surveillance started, on November 19, 1954, Investigator Riley and his investigators observed a truck, convoyed by a car, leave petitioner's home. They followed this "convoy" from petitioner's home in York County, Pennsylvania, to Rising Sun, Maryland, where they stopped the truck which was driven by two men, neither of whom is the petitioner. The unidentified driver of the convoying vehicle fled (App. 57a-59a).

The truck drivers were arrested and the truck was searched revealing a cargo of 404 gallons of non-tax-paid whiskey (App. 59a).

On November 22, 1954, on the basis that petitioner was the registered owner of the truck which held the illicit cargo, Investigator Riley appeared before the U. S. Commissioner in Baltimore and filed a complaint charging petitioner with "removing, depositing and concealing" the illicit cargo, thereby violating the Internal Revenue Code (26 USCA., (I.R.C. 1939), section 2913 and section 3321), and, a warrant for the arrest of petitioner was issued on the same day and was given to Investigator Riley, (App. 29a-31a).

Although the warrant, thus issued, stated, "To any United States Marshal or any other authorized officer * * * You Are Hereby Commanded, in the name of the President of the United States of America, to apprehend the said John Robert Joines * * * *wherever found and bring his body forthwith before me* or any other Commissioner * * *;" (App. 29a), Investigator Riley (and other officers), instead of executing the warrant, kept it in his possession (App. 62a), and conducted further surveillance of petitioner's home for the following twenty-one days. Although Riley saw petitioner at his farm almost every day during this "post-warrant" period of surveillance, he did not arrest him (App. 60a), and, moreover, on one occasion saw petitioner drive away from his home with what was observed by Riley to be another cargo of whiskey. He "tailed" petitioner but did not arrest him, choosing to continue his surveillance (App. 60a).

Investigator Riley decided to execute the warrant— " * * * before the arrest warrant got too old, before the time of the violation had gone too far past * * * " (App. 62a). The date for arrest was set for December 13, 1954.

and a group of four officers was dispatched on that day to go to petitioner's home and arrest him (App. 62a, 63a). Investigator Riley then turned the warrant over to one of the other four investigators, and, instead of assisting them, went to York, Pennsylvania, for the stated purpose of interviewing an informant regarding this case (App. 62a, 63a).

The investigators—four of them—in two autos, while Riley was in York to see his informant, approached petitioner's home at about 10:00 A.M. At this precise moment and by coincidence, the petitioner was not at his home but was sixteen miles distant in York, Pennsylvania, at the York County Court House attending court—the very place Investigator Riley appeared for the purpose of interviewing some unidentified informant (App. 64a) and, although he could have arrested petitioner at that time, he did not do so, nor did he make any effort to phone the arresting party then converging on petitioner's home (App. 64a, 65a).

Investigators Milewski, Cleary, Lorfing and Lenhoff, proceeded to petitioner's home, Milewski and Lorfing knocking on the front door, the other two deploying to outbuilding points (App. 39a). The only occupants of petitioner's home at this time were his 17 year old son and 21 year old nephew (App. 27a). His son answered the door and the investigators told him that they had a warrant for the arrest of his father, the petitioner, John Robert Joines. The officers were told the petitioner was not at home (App. 42a). The officers then stated they were going to search the home (App. 42a), and they "walked in" the opened door, without being refused admission (App. 42a, 43a). The officers then proceeded on a systematic search

of the house—from the first floor to the attic—searching each room and the closets of each room (App. 16a). Next, they went to the outside where they noticed an outside entrance to the cellar. The doors to this entrance were locked and the officers state they could lift these doors a few inches through which they peered, determined that petitioner was not therein (App. 17a), and saw mash barrels and sugar, and detected an odor of mash. Investigator Milewski then testified, " • • • And, Investigator Lorfing and I kicked the door entirely off its moorings and proceeded down the stairs with a flashlight" (App. 17a). They searched the cellar and found a 500 gallon still, mash and other products. At this point they arrested the petitioner's son, a juvenile, and his nephew, 21 years of age, and handcuffed them (App. 17a).

Investigator Riley at this time returned from York and arrived on the scene of the search and seizure. Samples of the mash and whiskey were taken.

The petitioner was not arrested until the following day, December 14, 1954, when he appeared voluntarily before the U. S. Commissioner at York and submitted himself to arrest (App. 30a) on the original warrant, and also charges growing out of the evidence that was turned up by the search the day before.

The petitioner was indicted on October 11, 1955, and charged with violations of sections 2810, 2833, 2834 and 3321 of the Internal Revenue Code (USCA - 1939 I.R.C.) for failing to register a still, distilling spiritous liquor without giving bond, making mash and removing and concealing spiritous liquor—all violations of the Internal Revenue Code based upon evidence searched for and seized on

December 13, 1954, in petitioner's home (App. 4a, 5a).

Petitioner presented a timely motion to suppress the evidence (App. 6a-8a), and the government filed its Opposing Affidavit (App. 9a-12a). Hearing was held thereon (App. 13a-28a) and the Court overruled the motion and filed its Memorandum Opinion (App. 32a-36a).

At the beginning of the trial, January 22, 1957, the petitioner renewed his motions to suppress which were overruled (App. 38a) and at the end the petitioner made the same motion with the same ruling of the court (App. 66a). Petitioner also demurred to the evidence and asked for a verdict of acquittal (App. 66a), all of which was overruled.

Petitioner was found guilty and sentenced to a term of two years. He is at liberty on bail.

An Appeal was taken to the Circuit Court of Appeals for the Third Circuit (App. 68a, 69a), and that court, on June 25, 1957, affirmed judgment of the District Court, and entered judgment the same date. (See unreported Opinion of the Circuit Court of Appeals, appended to this petition).

A timely motion for rehearing was filed and the Circuit Court of Appeals for the Third Circuit denied the petition (see Order Denying appended to this petition), on July 23, 1957.

The petitioner's 17 year old son, arrested at the scene of the "raid" on December 13, 1954, was discharged before trial because of his age. Petitioner's co-defendant, his 21 year old nephew, also arrested at the raid on December 13, 1954, was acquitted at trial.

REASONS FOR GRANTING WRIT

1. THE WARRANT FOR ARREST OF PETITIONER WAS INVALID AT LEAST FOR PURPOSE OF OFFICERS ENTERING HIS HOME TO SEARCH FOR AND ARREST HIM AND, THEREFORE, THE SEARCH AND SEIZURE WAS IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT. MOREOVER, ASSUMING WARRANT OF ARREST TO BE VALID, THE VIOLENT ENTRY OF PETITIONER'S HOME WAS UNLAWFUL.

Rule 4(b) (1) of the Federal Rules of Criminal Procedure provides that the warrant *"shall command* that the defendant be arrested and brought before the nearest available commissioner."

The warrant of arrest in this case, the only asserted authority the officers had for entering petitioner's home ostensibly to search for and arrest him, issued by the U. S. Commissioner, sets forth this command in the name of the President of the United States, "You are hereby commanded * * **to apprehend the said Robert Joines, wherever found and bring his body forthwith before me* * *."

The officer to whom that warrant was handed on the day it was issued—November 22, 1954—carried it in his pocket for twenty-one days thereafter—until December 13, 1954 (App. 62a), passing up almost daily opportunities to execute it by arresting petitioner (App. 60a and 64a), but chose, instead, to continue a surveillance of petitioner's home, (App. 60a).

Was this a compliance with the plain language of Rule 4(b) (1), and the commands set forth in the body of the warrant? Petitioner believes not and this abuse of the rules

had the effect voiding the warrant because this Court said in the recent case of *Rea v. United States*, 350 U.S. 214, at page 217,

> " • • • Federal Courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act • • • in federal • • • proceedings."

The Circuit Court in its opinion in the case at bar said, " • • • Officers of the Internal Revenue Service armed with a *lawful warrant* for the defendant's arrest appeared at his dwelling house to arrest him. • • • By virtue of the warrant of arrest which the officers held they had a lawful right to search the house for the defendant breaking open outer and inner doors if necessary. • • • "

If under the circumstances of this case—the deliberate delay for twenty-one days, passing up opportunities to arrest; and, if in view of the precise and circumscribing language of the *Rea case*, the effect was not to drain from the warrant its life and legality, then it is difficult to imagine circumstances which would so do.

Volume 6, *Corpus Juris Secundum*, "Arrest," Section 4, page 57, provides, " • • • it is the duty of the officers to carry out without delay the commands of a warrant which

is valid in form and issued by a court of competent jurisdiction."

This warrant was the process of a Federal Court. In *Go-Bart Importing Co. vs. United States*, 282 U.S. 344, this Court stated that the warrant was process of the Court. In issuing the warrant the United States Commissioner acted as an "inferior officer" of the District Court.

The manner in which officers entered petitioner's home and, the unnecessary violence in the course thereof, was unlawful and cannot constitute the legal basis for any search—a search to find the petitioner to arrest him or for any other reason.

In *McKnight v. United States*, (1950), 183 F. 2d 977, C.C.A. D.C., the officers had a lawful warrant for defendant's arrest. Judge Edgerton, in the Court's opinion said

> " * * * The police planned to and did reject a convenient and present opportunity to make a lawful arrest in a public street and, without a search warrant * * *, broke into a house in order to seize evidence they hoped to find there. * * * We think this is a plain violation of the prohibition of the Fourth Amendment of the Constitution against unreasonable searches and seizures. The government argues that what it aptly calls a 'police stratagem,' waiting until McKnight was locked in the house before arresting him, justified the police in breaking into the house in order to arrest him and seize the evidence. We think this untenable. 'The right to break open a door and make an arrest requires something more than a right

> to arrest.' The government concedes that even when officers have a warrant of arrest they may not break open doors unless there is some degree of necessity. * * * Neither policemen nor private citizens can justify breaking into a house, or other residence, by deliberately creating the alleged necessity for it. Since McKnight's arrest was accomplished by a needless and violent invasion of a private house, it was illegal * * * ."

The same principle—that "breaking doors" requires more than a right to arrest—is set forth in the Opinion in *Gatewood v. United States,* 209 F. 2d 789, C.C.A. D.C. and *Accarino v. United States,* C.C.A. D.C. (1949), 179 F. 2d 456.

Even if the officers, in the petitioner's case, had possessed a search warrant, they would have been faced with this statute,

> "The officers may break open any outer or inner door or window if a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance * * * ."—Act of Congress, June 25, 1948, C. 645, 62 Stat. 820, 18 U.S.C.A. 3109.

If Congress felt impelled to enact this limited right to break open doors when officers possessed a search warrant, is it not reasonable to argue that warrants of arrest are subject to at least the same restraint?

What are the facts in the petitioner's case? Officer

Lorfing testifies (App. 42a)—"He opened the door and the door remained open. He was standing there and I told him I was coming in to search for John Robert Joines. He made no effort to block my entrance, he stepped aside and I walked in." Does this sound like a refusal of admittance? Again (at page 17a of Appendix) Officer Milewski testifies, " ° ° ,° As we proceeded outside, we seen that the cellar doors were locked. We were able to pick it up approximately a foot from its moorings, *and from looking in determine whether anyone was in.* We saw sugar and barrels and also we got the odor of mash. *And Investigator Lorfing and I kicked the door enitrely off its moorings* and proceeded down the stairs with a flashlight. As we went in we found a 500-gallon Maryland-type still in operation." What was the "necessity" in this instance to kick "the door entirely off its moorings"? The officer testified that from looking in the one foot opening he was able to "determine whether anyone was in."

The officers were not refused admittance. The petitioner was not even at home. They could see into the cellar, before they kicked the door "entirely off its moorings."

Clearly, these facts and others make unlawful this entry into petitioner's home under the holding in the McKnight case and Gatewood case, to say nothing of its violation of the spirit of an Act of Congress. Thus, even assuming the warrant was lawful, the entry was unlawful.

The officers admit they had no search warrant and, if the result of their conduct and delay and noncompliance with Rule 4(b) (1), was to render invalid the warrant of arrest, the search and seizure in this case would then be clearly violative of the Fourth Amendment.

2. THE SEARCH AND SEIZURE IN THIS CASE WAS NOT INCIDENTAL TO A VALID ARREST BECAUSE — ASSUMING THE WARRANT OF ARREST WAS VALID AND THE ENTRY LAWFUL — THE SEARCH AND SEIZURE DID NOT OCCUR AT THE PLACE OF ARREST NOR AT THE TIME OF ARREST.

These two facts are not disputed: (1) *The search of the petitioner's home occurred while he was sixteen miles distant therefrom,* and (2) *the search occurred one full day before the arrest which, even then, did not occur at the place of the search.*

This Court said, in the recent case of *United States v. Jeffers,* 342 U.S. 48, at page 51,

> "The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both "houses" and "effects." Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. • • • *Agnello v. United States,* 269 U.S. 20, 70 L. ed. 145, 46 S. Ct. 4. Only where incident to a valid arrest, • • • or in "exceptional circumstances, may an exemption lie and then the burden is on those seeking the exemption to show the need for it, • • • ."

In *Agnello v. United States,* 269 U.S. 20, at page 30, this Court, in a unanimous opinion said,

> "The right without a search warrant *contemporaneously* to search persons lawfully arrested while committing crime; and *to search the place where the arrest is made* • • • is not to be doubted. • • • *But the right does not extend to other places.*"

And, again at page 32,

> "While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as incident *to a lawful arrest therein.* • • • The protection of the 4th Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. • • • "

The Circuit Court's opinion completely ignores the question of the applicability of the Fourth Amendment to the case at bar. It's Opinion seems to say that the warrant to arrest, *ipso facto*, authorized unlimited search of the petitioner's home. It stakes its whole opinion on one case, *Love v. United States*, 4 Cir. 1948, 170 F. 2d 32, which obviously is not at all in point. In the Love case the defendant was arrested at the time and place of search and, of course, the search and seizure were incident to a valid arrest. But, in the case at bar, the opposite facts pertain, as previously stated.

The *Opinion of the Circuit Court in the case at bar is at complete variance and in direct conflict with a number of decisions of this Court and other Circuits*, some of the other Circuit Court opinions being:

(1) *McKnight v. United States*, 1950, 183 F. 2d 977, C.C.A. D.C., in which the officers who had a warrant for

defendant's arrest, passed up an opportunity to arrest him on the street and waited until he got to his home where they appeared, arrested him and searched his home. Judge Edgerton, in the Court's opinion, said,

> "• • • Even if McKnight's arrest were legal it would not legalize the seizure of the evidence found in the house, *since the arrest was incident to the seizure and not the seizure to the arrest*. To call this seizure incident to this arrest is like saying that cashing a check is incident to writing it. Means are an incident to the ends, not ends to means."

(2) In *Lee v. United States*, C.C.A. D.C., 232 F. 2d 354, 1956, Judge Fahy said,

> "In support of the refusal of the Court to suppress the evidence, the United States contends that the search and seizure were incident to a lawful arrest. • • • It is argued that the arrest was lawful because the officer had probable cause to know that a felony had been committed • • • *But we do not reach that question because the search and seizure were not in reality incident to the arrest. The testimony shows that the search and seizure preceded the arrest.* • • • A number of courts have held in similar circumstances that such a search is not incident to the arrest, but rather, the arrest is in truth, incident to the search (citing cases). • • • And of course the search cannot be justified by what it turned up. *United States v. Di Re*, 332 U.S. 851 • • • ."

(3) In *Steeber v. United States*, C.C.A. 10th Cir. 198 F. 2d, 615, 1952, in which the search of the defendant's home was asserted to be based on probable cause—the crime having been committed in the presence of the officers, Judge Murrah said,

> "The search was certainly not incident to the appellant's arrest for *it did not occur until the day after the search.*"

(4) In *Walker v. United States*, C.C.A. 5th Cir. 225 F. 2d 447, 1955, the government contended the right to arrest and therefore search was based upon probable cause. In an opinion by Judge Cameron, the Court said,

> *"The arrest of appellant followed and did not precede the search.* • • • We are therefore not required to explore the controversy in progress between members of the Supreme Court as to the search which may attend a legal arrest."

(5) In *Rent v. United States*, C.C.A. 5th Cir. 209 F. 2d 893, (1954), in which the agents arrested the defendant the day before they searched his automobile, that Court in an opinion by Judge Rives, said,

> "• • • We hold the arrests of both defendants were legal."
>
> "The right to search incidental to arrest is, of course, a limited right. As expressed in several of the cases it is *limited to a search 'contemporaneously' conducted. Agnello v. United States* • • • ."

These five cases surely indicate the conflict between the Opinion in the case at bar and these Circuit Courts. Moreover, they surely point up the error of the Circuit Court's Opinion when it completely ignores this requirement of the Agnello, and other cases. The same doctrine of the Agnello case is repeated and confirmed in the recent cases of *Harris v. United States,* 331 U. S. at page 152; and *United States v. Rabinowitz,* 339 U. S. at page 64.

In the *Harris* case, which is generally recognized to represent the outside limits of the principle of search incidental to lawful arrest, this Court (331 U.S. 152) was careful to point out that, "Petitioner was *in exclusive possession* of a four room apartment." In that case, just as in the case at bar, the officers had a warrant but arrested the defendant in his home before the search started. It is quite obvious that the search in the *Harris* case would not have been sanctioned if Harris had not *first been arrested* and *present* while the search progressed.

In the *Rabinowitz* case, another decision of this Court which is generally recognized as going the limit with respect to this doctrine, the Court was careful to point out: "• • • (3) the room was small and under the *immediate and complete control of the defendant* • •." (339 U. S. 64).

There is not to be found a decision of this Court, or of any Court of Appeals, which sanctions a search of a dwelling house without a search warrant, as an incident to a lawful arrest, when the *owner is absent* and the *arrest did not in fact take place at the time of the search.* To sanction such a search would make a mockery of the Fourth Amendment.

It was long ago decided in the Circuit Courts that "a

search is not incidental to the arrest, unless the search is made at the *place of the arrest, contemporaneously with the arrest* * * *." *Papini v. United States,* C.C.A. 9th Cir., 84 F. 2d 160, 163.

Other decisions of this Court support this doctrine. No search without a search warrant is ever authorized until the accused has actually been placed in the custody of the officers. In *Johnson v. United States,* 333 U.S. 10, 16, this Court said that the government,

> " * * * is obliged to justify the arrest by the search and at the same time justify the search by the arrest. This will not do. An officer gaining access to private living quarters under the color of his office and the law which he personifies must then have some valid basis in law for the intrusion. Any other rule * * * would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

3. UNDER THE DECISIONS OF THIS COURT THE OFFICERS WERE REQUIRED TO HAVE A SEARCH WARRANT BECAUSE THE OFFICERS HAD PERSONAL KNOWLEDGE OF CIRCUMSTANCES SUFFICIENT TO SECURE A SEARCH WARRANT AT LEAST TWENTY-FOUR DAYS BEFORE THE SEARCH.

Investigator Riley, the officer who carried the warrant for twenty-one days, passing up opportunities to arrest petitioner, testified,

(1) that he saw on November 19, 1954, twenty-five days before the arrest, a cargo of 404 gallons of untaxed

whiskey leave petitioner's house, followed it to Maryland and seized it (App. 58a and 59a); and

(2) that he knew that petitioner was using his home as a "distributing point" for "his finished product," (App. 61a), and

(3) that while he was holding the warrant he, himself, saw defendant drive away from his home with another cargo (App. 60a), and

(4) he saw petitioner unload 100-pound bags of sugar onto his porch (App. 57a); and

(5) on many occasions he saw many known "violators" go to defendant's home (App. 56a), and

(6) he knew defendant was a previous violator, (App. 61a).

Are not these admitted observations by Investigator Riley sufficient to form the basis for the commissioners to issue a search warrant to permit searching petitioner's home for at least "concealed" untaxed whiskey which is one of the charges in the indictment (fourth count), (App. 5a)? In fact, they found concealed liquor in his home in the attic, when they searched it ostensibly to arrest petitioner, and they knew there was untaxed liquor there because days and weeks before they saw cargoes being hauled from it.

In the case of *United States v. Trupiano*, 334 U.S. 699, this Court, at page 705, said

> " • • • It is a cardinal rule in seizing goods and articles, law enforcement agents must secure and use

> search warrants wherever reasonably practicable (citing cases). This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. * * * "

Certainly Investigator Riley had more reason to believe that untaxed liquor was concealed in the petitioner's home than the officers had, in the case of *McDonald v. United States,* 335 U.S. 451, to believe that defendants were conducting a lottery. Mr. Justice Douglas speaking for the Court said,

> " * * * Moreover, when we move to the scene of the crime, the reason for the absence of a search warrant is even less obvious. When the officers heard the adding machines and, at the latest, when they saw what was transpiring in the room, they certainly had adequate grounds in seeking a search warrant."

And, at page 456,

> " * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of a home * * * ."

In *Garhart v. United States,* 157 F. 2d 777, 779 (C.C.A. 10th, 1946) the complaining witness recited that he had reason to believe a certain building, which he described, was being used to violate the revenue laws of the United States and gave the following facts to support

the belief: that he saw defendant delivering nine 100-pound sacks of sugar to a truck for delivery at the premises, that he saw a truck drive up to the building and deliver cases believed to contain certain whiskey, and that he saw several 100-pound sacks of sugar at the same time. This, with other facts stated, caused the Court to hold without discussion that sufficient grounds were shown to support the issuance of a search warrant. Are not the facts in the case at bar stronger than those in the *Garhart* case?

When the officers in the case at bar saw at least two cargoes of liquor being hauled from petitioner's home, saw 100-pound bags of sugar being unloaded at his home, saw known violators come and go, knew petitioner had been a violator—and all of this days and weeks before they entered his home—is not the reason for "the absence of a search warrant less obvious"?

Under these circumstances, therefore, a search warrant was required in the case at bar.

CONCLUSION

The petition should be granted, because—

(1) The officers had neither a valid, lawful warrant of arrest (because of violation of Rule 4(b) (1) by delay and disregard) nor, admittedly, did they have a search warrant; and, moreover, the violent entry into petitioner's home was unlawful.

(2) This search and seizure was not incidental to a lawful arrest for the reason that it did not occur at the place of arrest nor at the time of arrest and,

therefore, the Circuit Court's opinion is in direct conflict with the decisions of this court and other Circuits (Agnello and other cases).

(3) Inasmuch as the officers had ample time to get a search warrant and had sufficient information to support the issuance of a search warrant, they were required to secure one (Trupiano case and McDonald case).

One fact is certain: If the decision of the Circuit Court in the case at bar is allowed to stand then the odious general warrant has finally broken through the barriers of the Fourth Amendment, the *Agnello* and other cases. There will be no need, in the future, for officers to get search warrants because it is much easier and less obliging for officers to get a warrant of arrest for a simple misdemeanor, or for any other reason. The Circuit Court's opinion would then permit a search throughout the house and if the officers would merely wait until the defendant went away from his home they could go about their licensed search in a leisurely fashion.

The Circuit Court's Opinion is "beyond the sanction" of any opinions of this court and other Circuit Courts. *Kremen v. United States*, 1 L. ed. 2d 876 (1957).

The decision of the Circuit Court, in the case at bar, if allowed to stand, will achieve the startling result that officers may make *unlimited and unrestrained searches with a simple warrant of arrest* while with search warrants they may not do so.

The warnings set out by the authors of the dissenting opinions in the *Harris* and *Rabinowitz* cases have become

reality in the case at bar.

For the foregoing reasons, the Writ of Certiorari should issue and judgment below be reversed.

Dated: August 20, 1957 - York, Pennsylvania.

Respectfully submitted,

JUDSON E. RUCH

R. PALMER INGRAM

Attorneys for Petitioner.

Appendix A

Circuit Court's Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,186

UNITED STATES OF AMERICA

v.

J. PAUL JOINES AND JOHN ROBERT JOINES

Appeal of JOHN ROBERT JOINES

Appeal From The United States District Court

For The Middle District of Pennsylvania

Argued June 10, 1957

Before MARIS, KALODNER and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 25, 1957)

PER CURIAM:

This appeal from a judgment of conviction in a criminal case raises the question whether the defendant was convicted upon evidence obtained as a result of an unlawful search and seizure. Officers of the Internal Revenue Service armed with a lawful warrant for the defendant's arrest appeared at his dwelling house to arrest him. It turned out that he was not then at home but in the course of searching the house for him the agents after breaking open an outside cellar door came upon an illicit still in operation in the basement of the house. It is the evidence comprising this still which the defendant urges was seized unlawfully. We do not agree. We are satisfied from the evidence, as was the trial judge, that the officers searched the defendant's house in a bona fide attempt to find and arrest him and that they did not know of the existence of the still therein until they came upon it in the course of their search for the defendant. By virtue of the warrant of arrest which the officers held they had a lawful right to search the house for the defendant, breaking open outer or inner doors if necessary. *Hawkins v. Commonwealth*, 1854, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; *Commonwealth v. Reynolds*, 1876, 120 Mass. 190, 196; *Monette v. Toney*, 1919, 119 Miss. 846, 81 So. 593, 5 A.L.R. 261 and annotation thereto; *State v. Shook*, 1944, 224 N.C. 728, 32 S.E. 2d 329; Voorhees, The Law of Arrest, 1904, Sec. 153; 4 Am. Jur., Arrest, Sec. 83; 6 C.J.S., Arrest, Sec. 14. The

seizure of the still which they discovered in the course of that lawful search for the defendant was therefore not unlawful. *Love v. United States,* 4 Cir. 1948, 170 F. 2d 32, cert. den. 336 U.S. 912.

The judgment of the District Court will be affirmed.

A true Copy:

Teste:

CLERK OF THE UNITED STATES
COURT OF APPEALS FOR THE
THIRD CIRCUIT.

Appendix B

Circuit Court's Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,186

UNITED STATES OF AMERICA

vs.

J. PAUL JOINES and
JOHN ROBERT JOINES
JOHN ROBERT JOINES,
Appellant

On Appeal From The United States District Court
For The Middle District of Pennsylvania

Present: MARIS, KALODNER and STALEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF

Clerk

June 25, 1957

Appendix C

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD DISTRICT

No. 12,186

UNITED STATES OF AMERICA

vs.

J. PAUL JOINES and JOHN ROBERT JOINES

JOHN ROBERT JOINES,

Appellant

SUR PETITION FOR REHEARING

Present: MARIS, KALODNER and STALEY, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

MARIS

Circuit Judge

Dated:

July 23, 1957

Appendix D

Constitutional Provisions and Federal Rule of Criminal Procedure, 4(b) (1)

Fourth Amendment, United States Constitution—

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, United States Constitution—

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Federal Rule of Criminal Procedure—

"4(b) (1). Warrant. The warrant shall be signed by the commissioner and shall contain the name of the

defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner."

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SUPREME COURT, U.S.

No. 387

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In the Supreme Court of the United States

OCTOBER TERM, 1957

JOHN ROBERT JOLLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 387

JOHN ROBERT JOINES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 26-27) is not yet reported. The memorandum opinion of the District Court denying petitioner's motion to suppress (R. 4b-7b) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1957 (Pet. 28-29). A petition for rehearing was denied July 23, 1957. The petition for a writ of certiorari was filed on August 20, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal officers, searching for a person in his home to execute a valid warrant for his arrest, could seize and use as evidence a still found in the house.

STATEMENT

A four-count indictment was filed in the United States District Court for the Middle District of Pennsylvania charging that on December 13, 1954, petitioner committed various violations of the internal revenue laws relating to liquor (26 U.S.C. 2833, 2810, 2834, and 3321) (R. 4a-5a). Before trial, petitioner moved to suppress certain evidence that was taken from his home on December 13, 1954, on the ground that the seizure was unlawful (R. 6a-8a). Upon a hearing (R. 13a-28a) the court filed a memorandum opinion denying the motion (R. 4b-7b). Petitioner renewed his motion to suppress at the beginning (R. 38a) and at the end of his trial but it was again overruled (R. 66a). He presented no defense (R. 66a). The court found petitioner guilty as charged in the indictment (R. 49b) and imposed a general sentence of two years in prison (Pet. 8). In a *per curiam* opinion, the judgment was affirmed by the Court of Appeals for the Third Circuit (Pet. 26-27).

The evidence adduced by the government may be summarized as follows:

In September, 1954, agents of the Bureau of Internal Revenue began an investigation of petitioner for the illegal operation of a whiskey still (R. 28b-29b). They observed what appeared to be 100-pound bags of sugar being either loaded or unloaded at petitioner's farm house and also saw known violators visit petitioner (R. 29b-30b). On November 19, 1954, the agents saw

a panel truck loaded with cartons similar to those used by bootleggers to transport whiskey leave petitioner's Pennsylvania farm (R. 30b-31b). The agents followed the truck and stopped it in Maryland. It contained 404 gallons of "moonshine" whiskey. Petitioner was not in the truck but it was registered in his name (R. 32b). These factors led the officers to believe petitioner's home was a storage place for raw materials and a distributing point for the finished product (R. 34b). On November 22, 1954, a warrant was issued by the United States Commissioner in Baltimore, Maryland, upon the affidavit of the chief agent, for the arrest of petitioner for removing, depositing and concealing non-tax paid whiskey (R. 33b).

At the time the officers obtained the warrant they had not yet located the still which was the source of the illegal whiskey. They thought it inconceivable that the still would be located in petitioner's home, as it was generally considered too dangerous for a still to be located at the home of an operator, particularly when the home was used to store raw materials (R. 34b, 46b). Concerned over a still which could produce a large volume of whiskey, the agents continued the search for the still before they arrested petitioner so that production of the contraband liquor could be stopped as soon as possible (R. 29b, 33b-34b). After searching diligently for several weeks with negative results, the agents were ordered by their supervisor to arrest petitioner for the violation described in the warrant (R. 34b-35b). On December 13, 1954, four of the agents went to petitioner's home with the warrant and were admitted by petitioner's son and nephew. The agents presented their official credentials and stated that they had a warrant for the arrest of petitioner (R. 13b-14b).

They were told he was not at home. They then proceeded, without opposition, to search the house for him. Petitioner's son corroborated the officers' testimony that they told him they were searching for petitioner (R. 27b). They found a locked door on the first floor which petitioner's son said led to the basement. The son said he did not know where the key was. In the attic, the officers found illegal whiskey in jars (R. 14b). One of the agents testified (R. 14b):

> * * * I went back downstairs and out the back door and I noticed an entrance to a cellar. The door was fairly loose, and I raised it approximately 12 inches and looked in and saw several barrels, sugar bags, and a strong odor of fermenting mash. I asked Investigator Milewski to verify my findings. He looked in and verified it, and he also got the odor. We then pulled the door open, which gave way very easily. I went into the basement and there was an adjoining room to the basement. I went in there looking for Bob Joines, but he was not there, but this large distillery was that [sic] I saw.

It was this evidence that petitioner claimed to have been illegally seized.

The next day petitioner appeared at the United States Commissioner's office with his attorney and submitted to arrest (R. 44b).

The trial court found as a fact that the officers entered petitioner's house in good faith and observed the violations in the course of their search for petitioner. It concluded that, since the officers were lawfully on petitioner's premises, they had a right to seize the evi-

dence (R. 4b-7b). On appeal, the Court of Appeals for the Third Circuit said (Pet. 26):

> * * * We are satisfied from the evidence, as was the trial judge, that the officers searched the defendant's house in a bona fide attempt to find and arrest him and that they did not know of the existence of the still therein until they came upon it in the course of their search for the defendant.

ARGUMENT

1. The burden of petitioner's argument is that the federal officers utilized the warrant for the petitioner's arrest for the purpose of making a search for the still without first obtaining a search warrant. On the evidence presented to it (*supra,* pp. 2-4), the trial court found that the officers were engaged in a *bona fide* attempt to find the petitioner. The court below affirmed this finding (Pet. 26-27). There is no reason for this Court to reexamine this determination which is entirely factual.[1]

---

[1] Although petitioner does not argue the point in his petition, he points out in his statement that one of the agents went to a neighboring town to meet an informant in a last effort to determine the location of the still while the other agents were proceeding to petitioner's house to arrest him (Pet. 6). While keeping his rendezvous with the informant, that agent saw petitioner in the courtroom of the County Court House (R. 47b-48b). For some reason, petitioner suggests that the agent had a duty to arrest petitioner there or at least call the other agents to tell them petitioner was not at home. The same suggestion was put to the agent at the trial by defense counsel and the agent replied that "since his arrest was imminent anyway since Investigator Lorfing had the arrest warrant, and since he had to come back to his place of residence, it would be better if I let the plan go through and let the arrest be effected there without causing a commotion in that Court Room and without possibly as I said before, identifying the person with whom I intended to speak" (R. 48b). We fail to perceive the significance of this incident. If petitioner intends to imply that the

The petitioner also argues that the arrest warrant did not justify a forcible entry into the cellar, where the still was discovered, when the petitioner could have been arrested at an earlier date and without entering his house (Pet. 9-12). However, the record presents a perfectly logical explanation for the delay in executing the arrest warrant (*supra*, pp. 3-4). The entry into the cellar through the outside door was made only after access by an upstairs door had been denied. It was necessary in order to discover whether the petitioner was in the cellar and was not performed with any force in excess of that which was necessary (*supra*, p. 4).

The petitioner's argument that the officers had sufficient information to support a request for a search warrant and, therefore, should not have attempted to make the arrest until they had first obtained such a warrant, is without foundation both legally and factually. Assuming, on the basis of the finding of the two courts below, that the attempt to make the arrest was *bona fide*, the officers were under no legal obligation to obtain a search warrant before they attempted to execute the arrest warrant. Factually, the evidence is that the officers did not believe that the still was to be found on the premises. They would therefore have been acting in bad faith had they attempted to obtain a search warrant on the ground that there was probable cause to believe the still was there.

2. Petitioner's contention that the seizure was unlawful because it was not incidental in time and place to

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agents planned to visit his home while petitioner was away so they could seize the still, his logic is faulty. The still could have been seized as an incident to petitioner's actual arrest even if he had been home.

the arrest (Pet. 14-19) confuses the situation here with cases where a search is made coincidentally with, or subsequent to, an arrest and as an incident thereto.[2] Here there was no search made for the still, as an incident to an arrest or otherwise; the only search made was for the petitioner in order to arrest him. Having stumbled upon the contraband still in the course of that search, the officers properly seized it and it was, therefore, admissible in evidence. *Marron* v. *United States*, 275 U.S. 192.[3]

The issue involved here has been resolved by the courts before on almost identical facts. In *Paper* v. *United States*, 53 F. 2d 184 (C.A. 4), federal officers were searching the defendant's house to arrest him under a warrant when they discovered contraband liquor in his cellar. The trial court found that the officers were searching in good faith for the defendant and not conducting a search for evidence of crime; consequently the seizure of the liquor was held lawful. In affirming the judgment, the Court of Appeals for the Fourth Circuit said (53 F. 2d at pp. 184-185):

> We think there can be no question but that the evidence was admissible. The purpose of the Fourth Amendment was to prevent the use of "governmental force" to search a man's house, his person, his papers or his effects and to prevent their seizure against his will. Olmstead v. United States, 277 U.S. 438 * * *. Most cases of search

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[2] See *e.g. Agnello* v. *United States*, 269 U.S. 20; *Harris* v. *United States*, 331 U.S. 145; *United States* v. *Rabinowitz*, 339 U.S. 56.

[3] Cases dealing with seizures made after entries without a warrant of any kind are not pertinent. See *Johnson* v. *United States*, 333 U.S. 10; *Trupiano* v. *United States*, 334 U.S. 699; *McDonald* v. *United States*, 335 U.S. 451.

in violation of this constitutional provision involve the element of trespass, i.e., the entry without right upon the premises of the citizen. And all cases of unlawful search will be found to involve either this element or some element of fraud or subterfuge, as where an arrest is made a pretext for a search, or where the right to search having been obtained ostensibly for one purpose is used in reality for another. * * * But where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizen, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers, in this case, had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?

* * * * *

In this case the officers had the right to go upon the defendant's premises for the purpose of finding and arresting him. While lawfully there and searching for him in good faith for the purpose of making the arrest, and not as a pretext for searching the premises for evidence of crime, they discovered that a crime was being committed in their presence. This discovery did not render their search unreasonable or unlawful; and there is no reason in law or in common sense why their testimony as to the crime whose commission they discovered should be excluded.

The same conclusion was reached on the same facts by the Court of Appeals for the Fifth Circuit in *Lane* v. *United States,* 148 F. 2d 816, certiorari denied, 326 U.S. 720. The *Paper* decision was followed in *Love* v. *United States,* 170 F. 2d 32 (C.A. 4), certiorari denied, 336 U.S. 912, even though in the *Love* case the evidence used against the defendant was found in his home by officers searching there under a warrant for the arrest of another person who did not live there. See also *Parks* v. *United States,* 76 F. 2d 709 (C.A. 5), certiorari denied, 296 U.S. 573; *Benton* v. *United States,* 70 F. 2d 24 (C.A. 4), certiorari denied, 292 U.S. 642; see *Gibson* v. *United States,* 149 F. 2d 381, 383-384 (C.A. D.C.), certiorari denied *sub nom. O'Kelley* v. *United States,* 326 U.S. 724.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
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SEPTEMBER 1957.

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